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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 351 ✓

C. M. BAIR,

Petitioner,

VS.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION (a national
banking corporation),

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals

for the Ninth Circuit

and

SUPPORTING BRIEF.

HORACE S. DAVIS,

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STERLING M. WOOD,

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Counsel for Petitioner.



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**PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.**

*To the Honorable Charles Evans Hughes, Chief Justice
of the United States, and the Honorable the Asso-
ciate Justices of the Supreme Court of the United
States:*

Your petitioner, C. M. Bair, respectfully presents
his petition for a writ of *certiorari* to review a deci-

sion and judgment of the United States Circuit Court of Appeals for the Ninth Circuit, and thereby respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

I.

PROCEEDINGS IN COURT OF APPEALS.

On May 28, 1940, by opinion (R. 112-117) and judgment (R. 117-118) the Circuit Court of Appeals below affirmed two orders (R. 37-40; 79) of the United States district court for the district of Montana, requiring the appearance, under Rule 69(a), *Federal Rules of Civil Procedure*, and Section 9454, *Revised Codes of Montana*, 1935 (R. 75-78; App., pp. i-iii) of the petitioner before a referee for examination in proceedings supplementary to execution and in aid of judgment, and, pending such proceedings, enjoining the petitioner from disposing of any of his property not exempt from execution (R. 40).

Thereafter in time a petition for rehearing was filed, and on June 29, 1940, denied (R. 118).

On July 2, 1940, on application duly made, the mandate below was regularly stayed first to August 5, 1940 (R. 119), and subsequently to August 24, 1940.

II.

STATEMENT OF CASE.

On June 8, 1939, the United States District Court for Montana on affidavit presented (R. 33-36) made its *ex parte* order (R. 37-40) under Rule 69(a), *Federal Rules of Civil Procedure* and Section 9454, *Revised Codes of Montana*, 1935 (App., p. i) for the examination of the petitioner as the judgment debtor under a judgment (R. 2-4) theretofore recovered on September 14, 1938 (R. 4), in the same court by the respondent against the petitioner for \$100,057.95, principal, interest, attorneys' fees and costs (R. 3-4). Execution (R. 31-32) had previously been returned (R. 4-30) unsatisfied.

Specifically, the order of examination named a referee to conduct the proceedings (R. 39) with power (R. 39)

"* * * to fix the time and place or times and places of such hearing as may be necessary and to conduct such hearing or hearings in any county within the State of Montana at such places therein as may seem fitting and proper to said referee."

Specifically, the petitioner was ordered to (R. 40)

"* * * appear before the said referee at the time or times and place or places to be designated by said referee, and then and there to make true answers under oath concerning his property;
* * *"

Accordingly, the referee fixed the examination of the petitioner and certain others, denominated witnesses,

for a time and place within the county of the petitioner's residence in Montana (R. 42-43), the examination of other such witnesses in another county of the state at a different time (R. 43), and the examination of still others in a third county on yet another day (R. 43-44).

By timely motion the petitioner challenged the order for his examination (R. 54-57); this motion with another to vacate certain subpoenas issued (R. 63-67), not in question here, was heard in open court (R. 73-74), and thereafter on October 3, 1939, denied by order (R. 79) and written opinion (R. 75-79).

Appeals were timely taken thereafter from both the order for examination of June 8, 1939 (R. 80), and the further order entered October 3, 1939, denying the motion to vacate (R. 84). Supersedeas was granted (R. 71-83; 85-88).

Affirmance in the Circuit Court of Appeals for the Ninth Circuit followed as noted above.

B.

BASIS FOR THIS COURT'S JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a), *Judicial Code of the United States*, as amended, Section 347, Title 28, *United States Code*, and within the time limited by Section 350, Title 28, *United States Code*.

C.

QUESTION PRESENTED BY RECORD.

The question presented by this record is whether a federal district court may judicially amend Rule 69(a), *Federal Rules of Civil Procedure*, by fashioning a practice in supplementary proceedings unknown to either the state codes or the federal rules and sanctioning an examination thereby of a judgment debtor under color of the state practice and procedure, but wholly at variance with the applicable state statutes and decision of its court of last resort.

D.

REASONS FOR GRANTING WRIT OF CERTIORARI

A writ of certiorari should be granted herein to review the judgment and decision of the Circuit Court of Appeals below for these reasons:

(1) The Circuit Court of Appeals has decided an important question of local law in a way certainly in conflict with applicable local decisions, and has therefore clearly misapplied Rule 69(a), *Federal Rules of Civil Procedure*, to-wit:

(a) The state practice and procedure has been invoked under Sections 9454, 9458, *Revised Codes of Montana*, 1935 (R. 78-79), which specify in terms that the debtor's examination shall be held in the county of his residence at a time and place specified by the judge in the order. The state court of last resort has held in *In re Downey*, 31 Mont. 441, particularly at

444-445, interpreting Section 9454, that no order should be entered nor course of procedure adopted not authorized by the statute. But the Circuit Court of Appeals has ruled in effect that a federal district court following the state practice and procedure is, nevertheless, bound neither by this statute nor this decision of the state court, and may authorize multiple examinations in any county of the state.

(b) In the state practice the referee authorized by Section 9454 is appointed pursuant to Sections 9374, 9375 and 9376, *Revised Codes of Montana*, 1935 (App., pp. ii-iii) providing for a reference first upon the consent or agreement of the parties. Failing in this, the judge then may appoint, but not otherwise, a resident of the county where the proceeding is triable. The Circuit Court of Appeals has held, however, that, although the state practice and procedure have been invoked, the appointment of the referee for which provision is there made need not follow the local practice or statutes at all.

(c) In the state practice third persons suspected of concealing property of the judgment debtor or indebted to him may be examined only under Section 9457, *Revised Codes of Montana*, 1935 (App. p. i), pursuant to order made upon the affidavit required by that section. No such showing by affidavit or otherwise confessedly has been made to sustain the order here assailed. Yet the Circuit Court of Appeals authorizes an examination throughout the state of Montana of third persons in all particulars as though full

compliance were had with Section 9457, all of which is wholly contrary to any known state practice.

(2) The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States, to-wit:

(a) Rule 69(a), *Federal Rules of Civil Procedure*, provides for the examination of a judgment debtor, under the alternative here elected by the respondent, in the manner provided by the practice of the state in which the district court is held. But the Circuit Court of Appeals has ruled in effect that the substance of this rule, and hence by implication of the other rules of procedure promulgated by this Court, may be varied and judicially amended at the discretion of a district court.

(3) The Circuit Court of Appeals has so far sanctioned a departure by the federal district court for Montana from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States, to-wit:

(a) In substance the Circuit Court of Appeals under Rule 69(a), *Federal Rules of Civil Procedure*, has authorized a plain departure from the known practice of the state and from the unambiguous language of the state statutes invoked. For Section 9454, *Revised Codes of Montana*, 1935, as interpreted by the Supreme Court of Montana, in *In re Downey*, 31 Mont. 441, at 444-445, authorizes an examination of the judg-

ment debtor only in the county of his residence at a time and place specified in the order of the judge therefor, and implicitly forbids an order for multiple examinations, as at bar, at the discretion of the referee in any county of the state, or the examination of third persons generally throughout the state, short of compliance with Section 9457 of the state codes.

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted as prayed.

Dated, August 16, 1940.

HORACE S. DAVIS,
STERLING M. WOOD,
Counsel for Petitioner.

